UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 28

Docket No. DC-1221-11-0556-W-1

Jewel Lee Dorney,

Appellant,

v.

Department of the Army,

Agency.

March 6, 2012

Jewel Lee Dorney, Fayetteville, North Carolina, pro se.

Samantha Zeisset, Esquire, Fort Bragg, North Carolina, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d), REVERSE the initial decision, FIND jurisdiction, and REMAND the appeal for adjudication on the merits.

BACKGROUND

¶2 The appellant served as a nurse practitioner employed by the Department of the Army, Clark Health Clinic, Fort Bragg, North Carolina, from 1999 until

sometime in 2005 or 2006, at which point she resigned.[1] Initial Appeal File (IAF), Tab 8 at 3, Tab 5 at 9; Petition for Review (PFR) File, Tab 7 at 4. In 2004, the appellant brought to the attention of the Inspector General her concerns that "federal labor laws to ensure fair compensation" had not been followed by the clinic. IAF, Tab 5, Subtab L at 4. The appellant purportedly also discussed this concern with staff from the civilian personnel advisory center and her union. *Id*. at 6, Tab 1 at 6. The appellant alleges that the clinic administrator, Sherri Lasater, directed that she be reprimanded because Ms. Lasater was "covering herself" for not compensating the appellant for overtime worked. IAF, Tab 1 at 6. The appellant also alleges that in 2006 she testified before a medical board regarding practices, including uncompensated work time, at the clinic. IAF, Tab 5, Subtab C at 5.

¶3 In May of 2010, the appellant applied for a position as a GS-13 Supervisory Nurse Practitioner with the Community Based Primary Care Clinic. IAF, Tab 7 at 4, Tab 5, Subtab D at 11. According to the appellant, she was offered this position on August 27, 2010, but the offer was withdrawn because Ms. Lasater made negative statements about the appellant to the selecting official. IAF, Tab 1 at 6, Tab 5, Subtab D at 11, 23. The appellant also asserted that she had applied for positions at the Clark Clinic but was informed that "Ms. Lasater declined to accept [her] resume." IAF, Tab 5, Subtab D at 25.

¶4 On September 30, 2010, the appellant filed a complaint with the Office of Special Counsel (OSC) regarding the above events. IAF, Tab 5, Subtab D. Following notification that OSC had closed her complaint, the appellant filed a timely IRA appeal with the Board. *Id*. at 1, Tab 1 at 2. The administrative judge dismissed the appellant's IRA appeal for lack of jurisdiction on the basis that

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[1] The agency asserts that the appellant resigned in 2006, while the appellant asserts that she resigned in 2005. *Compare* Initial Appeal File (IAF), Tab 7 at 4 *with* IAF, Tab 8 at 3, Tab 5 at 9.

none of the appellant's claimed disclosures clearly implicated a violation of law, rule, or regulation, abuse of authority, a gross waste of funds, gross mismanagement, or a substantial and specific danger. IAF, Tab 9, Initial Decision (ID) at 3-7. Additionally, the administrative judge found that "[i]t is apparently undisputed that [the selecting official] based his decision, in some part, on a recommendation from Ms. Lasater," but held nevertheless that the appellant had failed to nonfrivolously allege that her purportedly protected activity was a contributing factor to her non-selection. *Id*. at 7. The administrative judge determined that the appellant failed to nonfrivolously allege that a person with actual knowledge of the appellant's allegedly protected activity influenced the action-taking official. *Id*. at 8. Furthermore, the appellant's disclosures preceded the non-selection by at least 4 years, outside the time period that a reasonable person could conclude that the disclosure was a contributing factor. *Id*.

¶5 The appellant filed a timely petition for review, to which the agency did not respond.

ANALYSIS

¶6 The Board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes nonfrivolous allegations that: (1) she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Kahn v. Department of Justice*, 528 F.3d 1336, 1341 (Fed. Cir. 2008). To establish that a nonfrivolous disclosure has been made, the appellant "must show the existence of a material fact issue ... to support Board jurisdiction. Nonfrivolous allegations cannot be supported by unsubstantiated speculation in a pleading submitted by" an appellant. *Id*. An appointment is a personnel action under section 2302(a), and an allegation of a

failure to appoint is an allegation of a failure to take a personnel action. *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1326-27 (Fed. Cir. 2006); 5 U.S.C. § 2302(a)(2)(A)(i). If an appellant successfully makes nonfrivolous allegations of jurisdiction, then the administrative judge must conduct a hearing on the merits. *Kahn*, 528 F.3d at 1341.

The administrative judge erred in holding that the appellant did not make a nonfrivolous allegation that she disclosed a violation of a law, rule, or regulation.

¶7 The administrative judge held that none of the appellant's claimed disclosures clearly implicated a violation of law, rule, or regulation. ID at 5. However, the record below shows that the appellant brought to the attention of the Inspector General her concerns that "federal labor laws to ensure fair compensation" had not been followed by the clinic with respect to overtime and working during lunch periods. IAF, Tab 5, Subtab L at 4, 6. The appellant exhausted her administrative remedies on this issue. *Id.*, Subtab D at 12, 33.

¶8 Title 5 contains provisions requiring compensation for time worked in excess of 40 hours in an administrative workweek. 5 U.S.C. §§ 5542-5543; *see* 5 C.F.R. §§ 550.111-550.114. The administrative judge therefore erred in holding that the appellant failed to make a nonfrivolous allegation of a protected disclosure. ID at 5. We find instead that the appellant's assertions must be addressed further to resolve whether a reasonable person would have believed that the agency's activities reported by the appellant violated federal law and regulations regarding compensation. *See Drake v. Agency for International Development*, 543 F.3d 1377, 1381-82 (Fed. Cir. 2008). [2]

[2] The administrative judge also found that the appellant failed to make a nonfrivolous allegation of an abuse of authority, a gross waste of funds, gross mismanagement, or a substantial and specific danger. ID at 5-7. We discern no error with respect to those findings.

The administrative judge's failure to address the issue of the appellant's alleged reprimand was error.

¶9 The appellant asserted in her petition for appeal that, shortly after she contacted her union regarding compensation practices in the clinic, she "received an official letter of reprimand" and that her "supervising physician, a captain, delivered the letter and informed [the appellant] that he was just the messenger and that Ms. Lasater was covering herself for not compensating [the appellant] for [her] overtime." IAF, Tab 1 at 6. The appellant made this same assertion in her complaint to OSC, thereby exhausting her administrative remedies. IAF, Tab 5, Subtab D at 16, 20, 23. Whether Ms. Lasater instructed a supervising physician to issue a reprimand to the appellant, and whether she gave such an instruction because of a protected disclosure by the appellant are material facts to be decided on the merits.[3] IAF, Tab 1 at 6. As the appellant raised this issue below and exhausted her administrative remedies with respect to this issue, the administrative judge's failure to address this issue in her initial decision was error. *Id*.; *see* ID.

The administrative judge's failure to address the appellant's assertions that Ms. Lasater refused to consider her application for other positions was error.

¶10 In her response to the administrative judge's show cause order, the appellant asserted that Ms. Lasater had refused to accept the appellant's application for additional positions for which Ms. Lasater was the selecting

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[3] Alleged reprisal for union activity or for prior testimony against the agency are not protected disclosures under 5 U.S.C. § 2302(b)(8), but rather are prohibited personnel practices under section 2302(b)(9). *Flores v. Department of the Army*, 98 M.S.P.R. 427, ¶ 9 (2005). Thus, the issue before the Board is not whether the appellant was reprimanded because she allegedly engaged in union activity, but rather whether a reprimand was issued because of a protected disclosure. Absent an otherwise appealable issue, claims of prohibited personnel practices under section 2302(b)(9) cannot serve as an independent basis for finding Board jurisdiction. *Flores*, 98 M.S.P.R. 427, ¶ 9; *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

official. IAF, Tab 5, Subtab D at 25, Subtab N at 5, 10. She specifically alleged that Ms. Lasater had refused to accept her resume in April and May 2009 for nurse practitioner positions at the Clark Clinic. *Id*. The appellant raised this issue in her complaint to OSC, and thus exhausted her administrative remedies. *Id*., Subtab D at 25. Because the appellant asserts that she was informed by a civilian personnel official that Ms. Lasater refused to consider her application, the appellant's assertions regarding why she was not selected for positions for which Ms. Lasater was the selecting officer are not mere speculation by the appellant, but rather raise an issue of a material fact. IAF, Tab 5, Subtab D at 25, Subtab N at 10. On remand, the administrative judge must address the merits of this claim.

The administrative judge erred in holding that a deciding official must have knowledge of an individual's whistleblowing activities in order for the Board to find that those activities were a contributing factor in the taking or failure to take a personnel action.

¶11 An appellant can show that a disclosure described under 5 U.S.C. § 2302(b)(8) was a contributing factor in a personnel action by proving that the official taking the action had constructive knowledge of the protected disclosure. *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶ 11 (2007); *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108 (1994). An appellant may establish constructive knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Greenup*, 106 M.S.P.R. 202, ¶ 11; *Marchese*, 65 M.S.P.R. at 108. The Supreme Court has adopted the term "cat's paw" to describe a case in which a particular management official, acting because of an improper animus, influences an agency official who is unaware of the improper animus when implementing a personnel action. *See Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1190, 1193-94 (2011) (applying a cat's paw approach to cases brought under the Uniformed Services Employment and Reemployment Rights Act of 1994).

¶12 The identity of the official who seeks to retaliate for the making of a protected disclosure is pertinent in a disciplinary action brought before the Board by OSC; however, in a corrective action appeal, the party before the Board is the agency, not its individual officials. *Worthington v. Department of Defense*, 81 M.S.P.R. 532, ¶ 10 (1999). Because this appellant seeks corrective action in an IRA appeal, a lack of actual knowledge by a single official is not dispositive. Rather, we must determine whether *the agency* took a wrongful personnel action against the appellant and whether that action should be corrected. *Id*.

¶13 In the instant case, the administrative judge concluded that it was undisputed that the selecting official based his decision, in part, on a recommendation from Ms. Lasater and that it was apparent that Ms. Lasater knew about some of the appellant's activities and disclosures. ID at 7-8. Thus, the appellant is not merely speculating but has made a nonfrivolous allegation that her allegedly protected disclosures were a contributing factor in the agency's decision not to select the appellant, and the administrative judge erred in holding otherwise.

The length of time between a disclosure and a personnel action, while potentially pertinent, is not dispositive of the question of whether the disclosure was a contributing factor to the personnel action.

¶14 A protected disclosure is a contributing factor if it affects an agency's decision to threaten, propose, take, or fail to take a personnel action. *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006); *see* 5 C.F.R. § 1209.4(c). To prove that a disclosure was a contributing factor in a personnel action, the appellant need only demonstrate that the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Rubendall*, 101 M.S.P.R. 599, ¶ 11. An employee can demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such

that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Id.*, ¶ 12; 5 U.S.C. § 1221(e)(1). However, the knowledge/timing test is not the only way for an appellant to satisfy the contributing factor standard; rather, it is only one of many possible ways to satisfy the standard. *Rubendall*, 101 M.S.P.R. 599, ¶ 12; *see* S. Rep. No. 103-358, at 8 (1994).

¶15 The Board has held that, if an administrative judge determines that an appellant has failed to satisfy the knowledge/timing test, she shall consider other evidence, such as evidence pertaining to the strength or weakness of the agency's reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant. *Powers v. Department of the Navy*, 69 M.S.P.R. 150, 156 (1995). Any weight given to a whistleblowing disclosure, either alone or in combination with other factors, can satisfy the contributing factor standard. *Id.*; *see Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

¶16 Here, the administrative judge noted that at least 4 years passed between the appellant's allegedly protected disclosure and the appellant's non-selection, and the Board has found that a personnel action taken within 1 to 2 years of a disclosure meets the knowledge/timing test; she then concluded that the appellant's non-selection occurred substantially outside this period. ID at 8. However, to the extent that the administrative judge implied that this length of time was dispositive of the issue of whether the appellant could potentially demonstrate that her alleged disclosures contributed to the personnel action in question, she erred. ID at 8; *see Powers*, 69 M.S.P.R. at 156.

¶17 The appellant has alleged that she was informed that Ms. Lasater caused the appellant's non-selection by telling the selecting official that the appellant was "slow" and not a "team player." IAF, Tab 1 at 6. Below, the appellant provided multiple performance appraisals in which she was rated in either the

highest or second highest appraisal categories. IAF, Tab 5, Subtab G. In both 2005 and 2004, the 2 years preceding the appellant's resignation, she was rated in the highest category. *Id*., at 3, 6. In 2004, her appraisal specifically called her a "[t]eam player" who "[g]ets along well with coworkers." *Id*. at 6. Thus, the appellant did not engage in unsubstantiated speculation that her alleged disclosures were a contributing factor to Ms. Lasater's actions but has raised a material issue about the strength or weakness of the agency's reasons for not selecting her that must be addressed on remand. *See Powers*, 69 M.S.P.R. at 156.

ORDER

¶18 For the foregoing reasons, we REMAND this IRA appeal to the Washington Regional Office for a hearing and adjudication on the merits of the appeal. Prior to holding a hearing, the administrative judge shall afford the parties a reasonable opportunity to complete discovery and order the parties to submit any other evidence that the administrative judge deems necessary to adjudicate the merits of this appeal. Consistent with this Opinion and Order, the administrative judge shall hold a hearing and issue a new initial decision that makes findings on whether the appellant is entitled to corrective action under the Whistleblower Protection Act.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.